

IN THE  
SUPREME COURT OF WEST VIRGINIA  
CHARLESTON

\_\_\_\_\_  
Appeal Nos. 33375 and 33376  
\_\_\_\_\_

MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,  
and BEECH RIDGE ENERGY, LLC; WEST VIRGINIA STATE  
BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Appellees;

and

ALICIA A. EISENBEISS and JEFFERY C. EISENBEISS,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,  
and BEECH RIDGE ENERGY, LLC; WEST VIRGINIA STATE  
BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO,

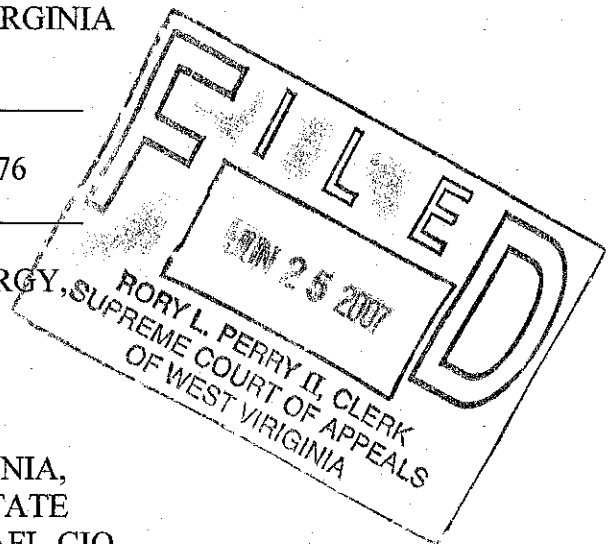
Appellees.

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INITIAL BRIEF OF THE PUBLIC SERVICE  
COMMISSION OF WEST VIRGINIA  
\_\_\_\_\_

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June 25, 2007

ON BEHALF OF THE PUBLIC  
SERVICE COMMISSION



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TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:

The Appellee, the Public Service Commission of West Virginia (hereinafter "Commission"), hereby tenders for filing with this Honorable Court its Initial Brief in Appeal Nos. 33375 and 33376. The Commission will file only one brief as these two matters were consolidated by Supreme Court Order dated April 18, 2007.

**STATEMENT OF THE CASE**

On November 1, 2005, Beech Ridge Energy, LLC (hereinafter, "Beech Ridge") applied for a siting certificate, pursuant to W. Va. Code §§ 24-2-1(c) and 24-2-11c, for a 186 megawatt (MW) wind-powered generating facility, to be located nine miles northeast of Rupert in Greenbrier County, and for a 13.8-mile 138 kV transmission line to connect the generating facility to Allegheny Power's Grassy Falls substation near Nettie in Nicholas County. Beech Ridge proposed to construct 124 wind turbines sized at 1.5 Megawatts, mounted on 262-foot tubular steel towers, and 150 pole structures for the transmission line, with a total project cost of \$300 million. Application, pp. 1-3 & attachments (Ex. Beech Ridge No. 1); Form No. 2, p. 2 (Notice of Filing Order, November 3, 2005); *Proposed Generating Facility* (Siting Rule 3.1.c.3<sup>1</sup>); *Financial & Economic Data* (Siting Rule 3.1.1.1.A), all attached to Application.

The transmission line will be built entirely within new rights-of-way from private

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<sup>1</sup>Rules Governing Siting Certificates for Exempt Wholesale Generators 150 C.S.R. Section 30-1-1. et seq (hereinafter Siting Rules.)

landowners.<sup>2</sup> The transmission line will run from the generating facility in a northwesterly direction towards Nettie in Nicholas County. The generating facility footprint will be 300 acres, more or less. The turbines are planned along various rural ridgetops located in western and northwestern Greenbrier County. The various arrays of turbines total approximately 23 miles. The wind turbines will be located on a 100,000 acre tract owned by MeadWestvaco. Tr. p. 14 (May 17, 2006) (David Groberg). The tract previously has been timbered, and coal has been surface mined from several parts of it. MeadWestvaco expects these uses to continue. Beech Ridge proposed to locate many of the turbines, as well as parts of the transmission line, on land reclaimed from old strip mining sites. *Site Selection* (Siting Rule 3.1.a.2), attached to Application.

There will be no air or water emissions from the project. David Groberg Direct, p. 21 (Tr. May 17, 2006). Beech Ridge does not require fuel to produce wind energy. *Description of Generating Facility* (Siting Rule 3.1.c.1); *Total Land Required* (Siting Rule 3.1.c.2); *Emissions List* (Siting Rule 3.1.c.3); *Technical Data* (Siting Rule 3.1.g.1); all attached to Application.

Beech Ridge selected this location because of its wind energy development potential, including terrain, geography and above-ground wind speeds; its substantial distance from environmentally or culturally significant areas; its location near major electricity transmission

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<sup>2</sup> The right-of-way route was preliminary at filing. Beech Ridge advised it would notify the Commission if the route changed. *Generating Facility Description* (Siting Rule 3.1.c.1), attached to Application. At hearing, Beech Ridge modified the transmission line because of concerns of property owners.

facilities; the availability of privately-owned land with concurrent uses; and, the absence of known critical habitat for any threatened or endangered species. *Reasons for Site* (Siting Rule 3.1.a.2), attached to Application. Beech Ridge looked for areas more than 10 miles away from National Parks, Wilderness Areas and other environmentally or culturally sensitive areas. *Siting Criteria* (Siting Rule 3.1.g.1.A), attached to Application.

Beech Ridge will offer the power for sale in the wholesale market, and its rates will be regulated by the Federal Energy Regulatory Commission (FERC). Form No. 2 p. 2 (Notice of Filing Order), attached to Application. Beech Ridge will request Exempt Wholesale Generator (EWG) status from the FERC. Application, p. 2.

Beech Ridge is owned by Invenergy Wind LLC, which has financed the development, construction and operation of more than 10 major power generation facilities around the world, totaling more than \$1.5 billion. While it may elect to sell partial ownership shares to separate passive ownership investors, Beech Ridge said it intends to maintain its ownership throughout this project's development, construction and operation. Application, p. 2.

Beech Ridge said that the project will create more than 200 temporary construction jobs and 15-20 permanent jobs with a \$35,000 average annual salary. Further, the project will result in at least \$400,000<sup>3</sup> yearly in revenue to Greenbrier County for 20 years and \$200,000 yearly in tax revenue to the state, as well as contribute to a growth in tourism.

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<sup>3</sup>Beech Ridge entered into an agreement with the Greenbrier County Commission that ensures Beech Ridge will pay at least \$400,000 a year in either tax or donations to the County (Conclusion of Law 17, Comm'n Order of August 28, 2006).



*Local & State Economic Impact* (Siting Rule 3.1.1.3), attached to Application.

Studies attached to Beech Ridge's application included bats, birds, sound and visual effects. Beech Ridge's bat studies were conducted at the site of the generating facility, and Beech Ridge said it also would conduct bat studies on the transmission line corridor<sup>4</sup>. David Groberg Direct, p. 14 (Tr. May 17, 2006).

The Commission received a substantial amount of public comment concerning this project in the form of thousands of letters. About two-thirds to three-fourths of the letters opposed the project. The Commission received several petitions for Intervenor status, and granted the following petitions: Stephanie Mendelson, West Virginia State Building and Construction Trades Council, AFL-CIO (Council), Michael A. Woelfel, Mountain Communities for Responsible Energy (MCRE), John Walkup, Jeffrey and Alicia Eisenbeiss, Frank Young, Citizens for Responsible Wind Power, Inc., West Virginia Highlands Conservancy, Cleve Benedict, Jim Lakiotes, and Friends of Greenbrier County.

On November 3, 2005, the Commission required Beech Ridge to publish notice of its application one time in Greenbrier, Nicholas and Kanawha Counties. Notice of Filing Order pp. 2-3. Beech Ridge published notice of its application in *The West Virginia Daily News* in Greenbrier County on November 9 and 21, 2005; *The Nicholas Chronicle* in Nicholas County on November 10, 2005; and the *Charleston Gazette* in Kanawha County on November 12, 2005. See Affidavits of Publication (Nov. 23, 2005).

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<sup>4</sup>Beech Ridge filed this study on October 10, 2006.

On February 6, 2006, the Commission found that the map Beech Ridge published in the Notice of Filing Order was very difficult to review, due, in part, to its size, inadequate reference markers and the inclusion of topographical lines. The Commission ordered Beech Ridge to publish the Notice of Filing again, one time in Nicholas, Greenbrier and Kanawha Counties, with a different map, taking into account the Commission's concerns. Comm'n Order of January 6, 2006, p. 25. Beech Ridge published notice of its application, with a revised map, in the *Charleston Gazette* in Kanawha County on February 24, 2006; *The West Virginia Daily News* in Greenbrier County on February 27, 2006; and *The Nicholas Chronicle* in Nicholas County on March 2, 2006. See Affidavits of Publication (Mar. 17, 2006). The Commission also noted in this order that the applicant placed copies of the application in various locations throughout the project area.

On April 25, 2006, the Commission conducted two hearings in Lewisburg, to receive public comment on the application. Several hundred attended each hearing and many in attendance spoke. The Commission also advised that it would continue to receive and consider written public comment, until the case was decided.

On May 1, 2006, the Commission required Beech Ridge to publish notice of the evidentiary hearing one time in Greenbrier, Nicholas and Kanawha Counties. Comm'n Order of May 1, 2006, p. 2. Beech Ridge published notice of the evidentiary hearing in *The Nicholas Chronicle*, *The West Virginia Daily News* in Greenbrier County, and *The Charleston Gazette*, all on May 4, 2006. See Affidavits of Publication (May 8, 10 & 11,

2006).

The Commission conducted evidentiary hearings on May 10, 11, 12, 16, 17, and 18, 2006, at the Commission's office in Charleston. At the evidentiary hearing, Beech Ridge, Stephanie Mendelson, the Council, MCRE, Jeffrey and Alicia Eisenbeiss, Michael Woelfel, and Commission Staff presented testimony.

At the beginning of the May 10, 2006, hearing, the Commission received public comment from people who were not able to participate in the Lewisburg hearings. The Commission requested those who had not previously spoken be given a chance to speak first, and for associations of persons, that only one person speak. Again the Commission noted the record would be held open for written comment which would be fully considered. Tr. pp. 11, 27-54 (May 10, 2006).

On May 17, 2006, Michael Woelfel filed a motion to dismiss the application. MCRE filed a motion to dismiss on May 18, 2006.

Stephanie Mendelson filed her Initial Brief on May 31, 2006 requesting the Commission reject the project. On June 26, 2006, the following parties filed Initial Briefs that in whole or in part supported the project: Beech Ridge, the Council, Commission Staff, Frank Young. Briefs from John Walkup, Jeffery and Alicia Eisenbeiss, MCRE were filed the same day protesting the application. On July 10, 2006, Beech Ridge, MCRE, Commission Staff, the Council, John Walkup, and Jeffery and Alicia Eisenbeiss filed reply briefs.

The Commission entered an Order on August 28, 2006 granting the certificate with the following conditions:

***General Preconstruction and Construction Certificate Issues:***

- (1) Prior to commencing construction, Beech Ridge must file a verified statement indicating that all pre-construction conditions and requirements of the certificate have been met.
- (2) Beech Ridge shall require all contractors to use standard noise buffers on all equipment and trucks.
- (3) Beech Ridge shall require contractors to use pile driving equipment which have the least noise impact and restrict pile driving, during the weekdays, to 7 a.m. to 7 p.m.
- (4) All construction activities should take place mostly during daylight hours.
- (5) Construction activities should be limited during church hours.
- (6) If dynamiting should become necessary, it should be limited to daylight hours and should follow all State and Federal rules, regulations, and laws.
- (7) Beech Ridge must dispose of all contaminated soil and construction debris in approved landfills in accordance with appropriate environmental regulations.
- (8) Beech Ridge must design, install and implement a fire protection system, using industrial best practices, in accordance with all applicable fire safety codes.
- (9) Beech Ridge must coordinate with fire, safety and emergency personnel during all stages of the project to promote efficient and timely emergency preparedness and response.
- (10) The siting and support transmission facilities certificates shall become invalid if Beech Ridge has not commenced a continuous course of construction within five years of the date the final certificate is granted or has not completed construction by the tenth year without petitioning the Commission for approval to expand these time frames, provided there are no material changes to the project that necessitate a reopening.
- (11) Beech Ridge must file with the Commission evidence of any necessary environmental permits and/or certifications prior to commencing construction (including any letters from US Fish & Wildlife, WVDNR, W.Va. Division of Cultural and History and West Virginia State Historic Preservation Office indicating either that Beech Ridge does not need to take further action or outlining what action Beech Ridge needs to take to be in compliance with that agencies rules/laws).
- (12) Beech Ridge must file evidence of approval and/or acceptance of the wetlands delineation (Beech Ridge needs to file with the Commission written evidence of the Wetlands survey being completed and approved); the final endangered

species study with any required mitigation plans; and the historical/archeological significance study with any required mitigation plans prior to commencing construction.

- (13) Beech Ridge must file copies of the final Interconnection Agreements between Beech Ridge and PJM prior to commencing operation.
- (14) Beech Ridge must comply with the Endangered Species Act (16 USC § 1531 *et seq.*), the Migratory Bird Treaty Act (16 USC § 701 *et seq.*), and, if applicable, the National Environmental Policy Act of 1969 (42 USC § 4321 *et seq.*) in both the construction and operation of the Project. Should any authorized governmental agency or court with competent jurisdiction find that Beech Ridge is not complying with any one of the above three acts in either the construction or the operation of the Project, then Beech Ridge must notify the Public Service Commission in writing in this case of any such finding within ten (10) days of any such finding being made. Furthermore, the Commission may seek any legal remedies it has authority to seek, including injunctive relief, to address any such findings.
- (15) Beech Ridge must file evidence of its EWG status from FERC prior to commencing operation.
- (16) Beech Ridge must have a decommissioning fund in place prior to commencement of operation. The fund will cover dismantling of the turbines and towers, as well as land reclamation. The fund should be an escrow account, or a bond or a surety that is held by an independent party, such as the County Commission. This fund shall not be a part of Beech Ridge's assets. Beech Ridge must hire an expert to assess, from time to time, the size of the fund that would be needed, taking into consideration resale or salvage value. Beech Ridge must obtain the Commission's approval of the evaluative expert, as well as Commission approval of the periodic reports. The Commission reserves the right to also hire its own evaluative expert to evaluate any of the periodic reports.
- (17) The construction of the I lines of turbines shall not occur unless all property owners agree to participate in the project.
- (18) Beech Ridge should provide, if it has not already, a copy of the guaranty agreement between Beech Ridge and the Greenbrier County Commission whereby Beech Ridge agrees to pay at least \$400,000 a year to the County. The Greenbrier County Commission may designate a fund for this minimum payment.

***General Operational Phase Certificate Issues:***

- (1) This condition applies at anytime—not just in the operational stage: If Beech Ridge should transfer its certificate, Beech Ridge must, pursuant to *Siting Rule*

7.1, notify the Commission in writing of the identity of the transferee and submit an affidavit from the transferee attesting to its willingness to abide by the terms of a siting certificate as issued.

- (2) Beech Ridge must use licensed certified herbicide applicators.
- (3) Beech Ridge must have the Material Safety Data Sheet filed on the plant site for all herbicides used on the transmission line right-of-way.
- (4) Beech Ridge shall not use aerial spraying on its transmission line right-of-way.
- (5) Beech Ridge shall provide the PSC with copies of all future interconnection studies and any interconnection agreement.
- (6) Beech Ridge shall prohibit the use of lighting in the project area as much as possible. Beech Ridge may light the project as required by the FAA, or any applicable fire or safety code, regulation or accepted good utility practice.
- (7) Beech Ridge will consult with a Technical Advisory Committee regarding the post-construction bat and bird studies. Membership shall be open to a representative of each of the following:

PSC,

US Fish and Wildlife Service,

WV DNR,

Bat and Wind Energy Cooperative,

A statewide environmental organization w/ 500+ members and in existence for at least 10 years,

A statewide bird group,

A private or academic institution with a background in avian issues,

Beech Ridge shall consult with the Technical Advisory Committee on the following:

- (a) Three years of post-construction bat mortality and adaptive management studies, after operations commence, to assess
    - 1) the project's impact, if any, upon bat life,
    - 2) the potential for adaptive management techniques to mitigate such impacts,
    - and 3) the expected costs over a range of mitigation effectiveness levels.
  - (b) Three years of post-construction bird studies, after operations commence, to assess the impact, if any, on birds.
  - (c) A one year post-construction eagle/osprey study.
  - (d) If the project causes significant levels of bat or bird mortality and adaptive management techniques are proven effective and economically feasible, Beech Ridge and its successors will make a good faith effort to work with the Commission to apply parameters to implement facility-wide adaptive management strategies on an on-going basis.
- (8) Beech Ridge shall update the Commission in writing twice a year on the

studies being conducted. The update shall be directed to the attention of the Commission's Executive Secretary. Unless Beech Ridge obtains Commission consent for other deadlines, the updates shall be filed on or before January 30 and July 31 each year. Beech Ridge shall provide a copy of each report to the members of the Technical Advisory Committee.

- (9) Beech Ridge's agreement to test adaptive management strategies shall be in effect immediately upon operation of the project. Beech Ridge may request modifications of its strategies in filings with the Commission.
- (10) There have been concerns expressed at Backbone, under certain atmospheric conditions, that unnecessary lighting can contribute to additional bird mortality. Thus, Beech Ridge shall work with its employees and the FAA to minimize the impact that lighting will have upon the project's visibility.
- (11) All of these terms apply to Beech Ridge, and to any subsequent owners/operators. (Comm'n Order of August 28, 2007)

The August 28, 2006 Order also denied the motions to conduct a view filed by MCRE, Mr. Woelfel and Mr. and Mrs. Eisenbeiss, denied the motions filed by Mr. Woelfel and Mr. and Mrs. Eisenbeiss to require Beech Ridge to post a bond for damages, denied the motions to dismiss Beech Ridge's application due to the insufficiency of Beech Ridge's maps, denied the motion to dismiss Beech Ridge's application due to the minor change in the transmission line location, and denied the motions to strike Beech Ridge's response to Mr. and Mrs. Eisenbeiss' Reply Brief. The letter from Dr. Pierpont attached to Mr. and Mrs. Eisenbeiss' Reply Brief was accepted as public comment.

On September 5, 2006, the Commission received a Petition for Reconsideration of the August 28, 2006 Order filed by Stephanie Mendelson. Michael Woelfel filed a Petition for Reconsideration on September 8, 2006, and Alicia and Jeffery Eisenbeiss and MCRE filed Petitions on September 18, 2006. The Council responded to the Petitions of Woelfel and Mendelson on September 18 and to MCRE and the Eisenbeiss Petitions on September 27,

2006. Beech Ridge filed a consolidated response to all Petitions on September 28, 2006.

On January 11, 2007, the Commission denied the Petitions for Reconsideration filed by MCRE, Mr. Woelfel, Mrs. Mendelson, and Mr. and Mrs. Eisenbeiss. The Commission also ordered Beech Ridge to notify the Commission when all pre-construction conditions have been met. When the Commission receives that notification, the Commission will schedule a hearing regarding those conditions, with the burden on Beech Ridge to prove all conditions have been met.

On February 12, 2007, this Honorable Court received a Petition for Appeal from MCRE, which was docketed as Case No. 070449. Also on February 12, this Court received a Petition for Appeal from Alicia and Jeffery Eisenbeiss, docketed as Case No. 070433. On April 18, 2007, this Honorable Court issued an order that granted both MCRE's and the Eisenbeiss' Petitions for Appeal

### **PROCEDURAL HISTORY**

The procedural history of this case can be found in the Commission Orders dated August 28, 2006 and February 11, 2007 and also in the above statement of the case. Therefore, no additional procedural history will be provided here.

### **ASSIGNMENTS OF ERROR**

The following assignments of error are alleged by MCRE:

- I. The Court should reverse the Commission's January 11, 2007 Order denying MCRE's Petition for Reconsideration because the Commission has, under the guise of interpretation, arbitrarily ignored, revised, or amended its EWG Siting Rules resulting in an application of the rules



that does not conform to the purpose of the wording of the Rules or the intent of W.Va. Code §24-2-11c.

- II. As a result of the Commission's arbitrary revision of the EWG Siting Rules, the Commission's Orders do not include adequate findings of facts or conclusions of law to reflect that the Commission properly appraised and balanced the interests of, and potential social and environmental impacts to the citizens and communities located within the vicinity of the proposed project.

The following assignments of error are alleged by Alicia and Jeffery Eisenbeiss:

- I. The Public Service Commission of West Virginia erred in their discretion in the use of authority to appraise and balance the interests of the public and the interest of the state and local economy, by failing to conduct any thorough, independent evaluation of all respective positions presented in this case. Denying and intentionally disregarding the interests of the public, the general interests of the state and local economy, predisposes a conclusion in the interest of the Applicant.
- II. The Public Service Commission of West Virginia erred by not dismissing an application that failed to comply with Siting Rules on numerous facets. Though the Commission may interpret the Rules, the Applicant's application was erroneously flawed with deliberate inaccuracies and apparent misrepresentation.

### SUMMARY OF ARGUMENT

The Commission respectfully disagrees with MCRE's and the Eisenbeiss' assignments of error. The Commission did not ignore or revise the Siting Rules. Moreover, the Commission properly appraised and balanced all of the different interests, including those of the public.

First, the Commission properly complied with the statutory requirements of West Virginia Code §24-2-11c in granting a siting certificate. Under the guiding statute, the

Commission is to appraise and balance the interests of the public, the interests of the state and local economy, and the interests of the applicant. If the Commission finds the balancing of those interests is in favor of granting the certificate, the Commission then must look to see if the terms and conditions of any public funding or any tax abatement agreement offends the public interest and if the project will result in substantial positive impact on the local economy and employment. The Commission performed this balancing and found the positives outweighed the negatives, there is no public funding or tax abatement agreement, and there will be a positive impact on the local economy. Consequently, the Commission granted the siting certificate.

Second, the purpose of the Commission's Siting Rules, 150 C.S.R. 30, is to require the applicant to collect, document and display information about the project for the Commission and the public to review and also to put the applicant on notice as to what information it needs to consider in order to complete the permitting process. Under these rules, the Commission properly found Beech Ridge filed a sufficient application for review. The Commission found the deficiencies in the filing, specifically the 5-mile map, raised by the Appellants did not warrant dismissal of the application. Much of the Appellants' argument centered on the contention, in their opinion, that there were certain items omitted from the map that should have been depicted on the map. However, in the Commission's opinion, the question of whether a particular area is a recreational area or an area of cultural significance, for example, is a matter that can be fairly disputed. Certainly the Intervenors

were not deprived of the opportunity to present evidence regarding the impact of the project on all areas regardless of whether they were depicted on the Beech Ridge map.

Third, the Commission did not improperly delegate its statutory mandate to another agency when it comes to matters of culture and history by conditioning this certificate upon approval of the State Historic Preservation Office (SHPO). Specifically, the legislature has by statute charged SHPO with the duty to preserve and protect historic, architectural, archaeological and cultural sites. Beech Ridge must receive approval from SHPO before it can build this project.

Fourth, the Commission did not amend or alter the requirements of its Siting Rules in any of its rulings. The Commission has the ability to review technical findings and does not require independent studies to make decisions on issues such as noise, viewshed, birds, bats, etc. In exercising its quasi-judicial powers, the Commission reviews and evaluates the evidence and arguments presented by the parties. Furthermore, the Commission has no statutory duty to hire, or pay for, independent experts. Therefore, the Commission did not violate its statutory mandate when it did not hire independent experts to advise the Commission.

Finally, the Commission has safeguarded the interests of the community with a comprehensive list of conditions the applicant must follow and by requiring a compliance hearing on the pre-construction conditions, with the burden on the applicant to show compliance, before construction can begin.

## STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in West Virginia Code §24-5-1, which provides in part:

[A]ny party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty (30) days after the entry of such order, praying for the suspension of such final order.

In the process of reviewing a Commission Order, this Court is guided by the well established principle that the Order will not be disturbed upon appeal unless such findings are arbitrary, unjust, contrary to the evidence or without evidence to support them, Baltimore & Ohio Railroad v. Public Service Commission, 99 W.Va. 670, 130 S.E. 131 (1925), or unless the decision is based upon a mistake of law or misapplies legal principles. Preston Co. Light & Power Co. v. Public Service Commission, 197 F. Supp. 759 (S.D. W.Va. 1969); United Fuel Gas Company v. Public Service Commission, 143 W.Va. 33, 99 S.E.2d 1 (1957); Wilhite v. Public Service Commission, 150 W.Va. 747, 149 S.E.2d 273 (1966); Virginia Electric & Power Co., v. Public Service Commission, 162 W.Va. 202, 242 S.E.2d 698 (1978).

[R]eview by the Supreme Court of Appeals, while not calling for an independent judgment as to both law and facts, does provide a review in regard to the evidentiary support for the findings of the Commission as well as the correctness of the legal principles applied and conclusions reached by the Commission. [Preston Co. Light & Power Co. v. Public Service Commission, supra, at 766.]

Several years ago this Court reconsidered the standard of review to be applied in Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 176 S.E.2d 179 (1981). In Monongahela Power, this Court adopted the comprehensive standard of review applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

After discussing the merits of the more comprehensive standard of review in Permian Basin, this Court adopted the Permian Basin three-pronged analysis as follows:

The first is a rather broad inquiry centering on whether the Commission abused or exceeded its statutory jurisdiction and powers. The second step relates to an analysis of the Commission methodology and a determination of whether there is adequate evidence to support the Commission's findings. The third analysis looks to the substantive result of the Commission's Order to see if it has arrived at a proper determination. [Monongahela Power, 176 S.E.2d at 183.]

It should be noted that although the Court reviewed a Commission rate case decision in Monongahela Power, the same standard of review would apply to the Commission's ruling in a siting certificate case.

Similarly, in C & P Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), the West Virginia Supreme Court of Appeals began by reiterating the three-pronged standard of review established in the Monongahela Power case, supra, and went on to hold generally that: "The Court's responsibility is not to supplant the Commission's balance of interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."

Op cit. at 611.

Furthermore, the C&P case affirmed the Supreme Court's holding "that this Court will not substitute our judgment for that of the Commission on controverted evidence". Id. p. 611.

In Braxton County Citizens for a Better Environment v. The Public Service Commission of West Virginia, 429 S.E.2d 899 (1993) and in Harrison Rural Electrification Association, Inc. v. The Public Service Commission of West Virginia, 190 W.Va. 439, 438 S.E.2d 782, (December 9, 1993), this Court reaffirmed the use of the standard of review set forth in the Monongahela Power case.

### **ARGUMENT**

**I. The Commission properly complied with the statutory requirements of West Virginia Code §24-2-11c in granting a siting certificate to Beech Ridge.**

The Appellants assert the Commission erred by approving a siting certificate without having received all the information in the application required by the Commission's regulations. The Commission disagrees with MCRE's and the Eisenbeiss' assertions. The Commission considered voluminous amounts of evidence and properly weighed the various interests involved as is evidenced by the record that is before this Court and the numerous finding of facts and conclusions of law in both the August 28, 2006 Order and the February 11, 2007 Order. The Commission, within the boundaries of its statutory authority, determined it was reasonable to grant a siting certificate to Beech Ridge.

West Virginia Code §24-2-11c(c) sets out the statutory framework for the Commission's analysis when evaluating siting certificates:

In deciding whether to issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate, the commission shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant. The Commission may issue a siting certificate only if it determines that the terms and conditions of any public funding or any agreement relating to the abatement of property taxes do not offend the public interest, and the construction of the facility or material modification of the facility will result in a substantial positive impact on the local economy and local employment.

The Longview test cited by MCRE is basically a restatement of this statute, and it is the statute and not the Longview test that controls the siting of this project (Longview Power, LLC, Case No. 03-1860).

**A. Beech Ridge's interest to construct an EWG facility**

The Commission properly concluded Beech Ridge has a reasonable business interest to develop a wind energy project. Further, the Commission held Beech Ridge has demonstrated the ability to construct and operate this facility (Conclusion of Law 12, Comm'n Order of August 28, 2006). Further, the Applicant's interest in building, owning and operating the project also encompasses its business relationship with MeadWestvaco, the property owner, and MeadWestvaco's right to use its property.

**B. General interests of the state and local economy**

There is a verifiable need for electricity on the East Coast of the United States. It is estimated the reserve margin (the difference between capacity and demand) will be reduced

from 18% in 2005 to 4% in 2014, causing the region to have insufficient reserves to meet its peak demands. The current generating facilities are also aging. Added to that, there is an increased need for this type of electricity as renewable sources begin to be pushed to forefront (Conclusions of Law 13 and 16, Comm'n Order of August 28, 2006)<sup>5</sup>. Today, the generation and transmission of electric power is conducted at a national level based on regions consisting of several states. Transmission lines are operated on a regional basis and power plants are dispatched to meet demand throughout the region. West Virginia is a generator of electricity and connected to the interstate transmission grid to ensure West Virginia residents continue to receive reliable electric service (Conclusion of Law 14, Comm'n Order of August 28, 2006). Indeed, in the last few certificate cases, the Commission has looked to the regional needs in determining the need for a project. See for example Backbone Mountain Windpower, LLC, Case No. 00-1209-E-CN, Comm'n Order, December 29, 2000; Nedpower/MountStorm, LLC Case No. 02-1189-E-CN, Comm'n Order, April 2, 2003; Longview Power, LLC, Case No. 03-1860-CS-CN, Comm'n Order, August 27, 2004. The Commission recognizes the long-term benefits to the State's residents in having West Virginia participate responsibly in the electric industry which will serve to

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<sup>5</sup> The demand for renewable sources of energy will continue to rise in the future. According to information obtained from the Database of State Incentives for Renewables and Efficiency(DSIREUSA.org), at least twenty-five(25) states and the District of Columbia have already instituted some requirement, goal or incentive programs for utilities within their state to include renewable sources of energy as part of their supply portfolio. Most of programs/requirements include provisions that utilities increase the amount of energy obtained from renewable resources over the next few years.



safeguard the availability of productive, well-maintained grid resources to the State's residents.

This project will also benefit the local economy through the creation of jobs and additional tax revenues. The project is estimated to produce over 200 construction jobs for an 8-10 month period and it is estimated to create 15-20 permanent jobs, with an average salary of \$35,000 (Conclusion of Law 17, Comm'n Order of August 28, 2006). The project will also generate at least \$400,000 in revenue to Greenbrier County for 20 years. That amount of revenue has been guaranteed through an agreement between the Greenbrier County Commission and Beech Ridge even if the property assessments do not generate taxes in that amount. The state will receive approximately \$200,000 a year in property taxes (Conclusion of Law 17, Comm'n Order of August 28, 2006). In addition, the Council submitted an economic impact study and testimony from Chris Thompson, Ph. D. who testified this project would have a substantial positive economic impact on the area based upon his study (Conclusion of Law 19, Comm'n Order of August 228, 2006). The evidence of positive economic benefits was subject to cross-examination and the Commission was persuaded that the project will result in economic gains (Conclusion of Law 25, August 28, 2006).

### **C. Interests of the public**

Many citizens in the local vicinity of the project stated objection to it for a variety of reasons including loss of tourism, reduction in property values, noise, viewshed, and danger

to birds and bats. In the areas of tourism and property values, there was never any concrete evidence introduced into the record that showed these things would be impacted negatively. In the area of tourism, the Commission only received statements or opinions of the Intervenors that oppose the project. The Commission found such testimony was simply conjecture because it had no foundation (Conclusion of Law 21, Comm'n Order of August 28, 2006). As for the property value argument, only Beech Ridge submitted a verified study on the potential effect on property values. Jay Goldman studied the effect of similar turbines in Tucker County on the property values in that County. The conclusion of his study was that the turbines had no effect on property values (Conclusion of Law 22, Comm'n Order of August 28, 2006). While Jeffery Eisenbeiss testified concerning this topic and he is a real estate appraiser, he did not present any studies he conducted concerning this topic (Finding of Fact 31, Comm'n Order of January 11, 2007). Once again, the Commission found that the property value arguments against the project were based on opinions and not concrete evidence.

Several Intervenors, most notably the Eisenbeisses, expressed concern over the noise this project may produce. However, the overwhelming majority (90%) of turbines will be located at least 1 mile from a residence (Finding of Fact 17, Comm'n Order of August 28, 2006). The unrefuted testimony in this case is that states that have imposed required set backs for turbines require them to only be 750 to 1,000 feet from structures (Finding of Fact 16, August 28, 2006). So, a one mile set back is much greater than what has been used in

other states and ensures the overwhelming majority of structures will be a reasonable distance from a noise source. Specifically, the Eisenbeiss' home is about 1 mile from the nearest proposed wind turbine, while portions of their unoccupied property are much closer. Tr. pp 237-238 (May 16, 2006)(Jeffery Eisenbeiss). Furthermore, the only noise study done for this project by Beech Ridge showed the existing ambient noise levels in the project area to be in the range of 50 Ldn<sup>6</sup>. The noise levels of the project were estimated not to exceed 52 Ldn at the measurement sites, and those estimates assumed operation of all 124 turbines at the same time. Just for reference, a normal conversation occurs at 60 Ldn (Conclusion of Law 34, Comm'n Order of August 28, 2006). That means, for the most part, the noise in the project area is already greater than the noise this project is estimated to generate. The noise study concluded residents 4,000 feet from the project might hear some noise, but the levels will be less than the existing ambient levels (JDBD-2, Entered on May 11, 2006). The Commission reviewed the study submitted by Beech Ridge, and acknowledged the Intervenor's objections to portions of the study. In the end, the Commission determined the study submitted by Beech Ridge was reliable (Conclusion of Law 35, Comm'n Order of August 28, 2006).

The Eisenbeisses submitted statements from Dr. Nina Pierpont concerning noise. However, those statements were only considered public comment as she did not appear at the hearing for her statements to be subject to cross-examination. Dr. Pierpont has been studying

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<sup>6</sup>These numbers were calculated by placing various noise measuring devices throughout the project area (JDBD-2, Entered on May 11, 2006).

the effects of noise created by projects such as this. She believes there should be greater set backs than have been imposed in this case, but as noted above, the set backs in this case are already greater than what is required in other states that impose required set backs.

The visual impact of this project was a hotly contested issue, but visual impact concerns are mostly subjective. What one person considers beautiful, another may consider ugly, while yet others are indifferent. The same goes for wind turbines. Some people consider them eyesores they do not want in their backyards. Others consider them elegant or beautiful.

The visual impact of this project is also limited almost entirely to private residences. In past Commission proceedings, certain parts of projects have been removed because of the potential visual impact from public, scenic overlooks, Dolly Sods and Blackwater Falls. For example, in an order dated April 2, 2003, Case No. 02-1189-E-CN NedPower Mount Storm, LLC, Conclusion of Law 12, the Commission ordered the Southern Phase of the project could not be built because of its close proximity to the Dolly Sods Wilderness Area and because there was no evidence the project would fail without that phase be built. There are no such public scenic overlooks in this case that are that close.

There is no doubt this project will kill some birds and most likely a larger number of bats. However, the evidence demonstrated it is highly unlikely any of the species killed will be endangered (Conclusions of Law 43 and 44, Comm'n Order August of 28, 2006). Also, in an effort to understand the interaction of bats and wind turbines, Beech Ridge has been

required and will conduct studies and implement mitigation techniques once the project is operational to try and better understand this perplexing issue. Included in those mitigation techniques are measures such as putting brakes on the turbines so they will not spin unless the wind is strong enough to produce electricity and also increasing the cut-in speed, the wind speed at which turbines actually generate electricity (Conclusion of Law 45, Comm'n Order of August 28, 2006). Lastly, as part of the operational conditions of this certificate, the Commission created a Technical Advisory Committee whose membership is open to the PSC, U.S. Fish and Wildlife, WV DNR, Bat and Wind Energy Cooperative, a statewide environmental organization w/ 500+ members and in existence for at least 10 years, a statewide bird group, and a private or academic institution with a background in avian issues. The purpose of that Committee will be to consult with Beech Ridge on the following issues:

- (a) Three years of post-construction bat mortality and adaptive management studies, after operations commence, to assess 1) the project's impact, if any, upon bat life, 2) the potential for adaptive management techniques to mitigate such impacts, and 3) the expected costs over a range of mitigation effectiveness levels.
- (b) Three years of post-construction bird studies, after operations commence, to assess the impact, if any, on birds.
- (c) A one year post-construction eagle/osprey study.
- (d) If the project causes significant levels of bat or bird mortality and adaptive management techniques are proven effective and economically feasible, Beech Ridge and its successors will make a good faith effort to work with the Commission to apply parameters to implement facility-wide adaptive management strategies on an on-going basis. (Comm'n Order of August 28, 2007)

So, while the issue of bird and bat mortality is a concern associated with this project, the

Commission has taken appropriate and reasonable steps to mitigate those impacts. Also, this is an area that is under the purview of U.S. Fish and Wildlife. The Commission's conditions seek to protect the community interests and mitigate the potential impacts without infringing on the authority of other agencies. U.S. Fish and Wildlife has suggested, in public comments, three years of pre-construction study on bat activity in the area. However, Siting Rule 3.1.m does not specify how many years of pre-construction studies should be performed. The Commission considered U.S. Fish and Wildlife's recommendation, and found that more pre-construction studies would not be very helpful in understanding bat mortality (Conclusion of Law 38, Comm'm Order dated August 28, 2006). Also, the Commission found that the recommendation was simply a guideline, voluntary, and not being implemented uniformly across the Country (Conclusions of Law 62, 63, 64, and 65, Comm'n Order date August 28, 2006). In the end, U.S. Fish and Wildlife has the opportunity to require three years of study, or take any other action it deems appropriate, because the Commission has conditioned approval of this project on any action the project must take that is required by that agency.

The Commission would also note the expressed "interests of the public" in this case do not just include opposition to the project. Several members of the public have expressed support for this project for a variety of reasons including economic development and clean, renewable energy. As a matter of fact, the Sierra Club of West Virginia filed a letter of support for this project as long as certain conditions are met (See case file generally).

In its recent decision, Burch et al v. Nedpower Mount Storm, LLC, \_\_\_ W. Va. \_\_\_, S.E. 2d.(June 8, 2007)(2007 W. Va. Lexis 47, Supreme Court Case No. 33201), this Honorable Court considered the Commission's duties under the balancing of 24-2-11c. In that case, this Court stated:

Notably absent in this balancing of interests are the interests of nearby landowners whose use and enjoyment of their properties may be substantially interfered with by the operation of an electric generating facility. Because the rights of nearby landowners are not a primary consideration in the PSC's siting determinations, we determine it is necessary to preserve the traditional rights of these landowners to seek appropriate remedies in the circuit courts.

Burch at pp 12-13 of Supreme Court Slip Opinion. Interestingly, many of the negatives associated with this project relate to the economic interests of local landowners, specifically, the viewshed, noise and property value arguments. All three of those areas relate in some way to the specific economic interests of local landowners rather than the interests of the public as a whole in this case. The Commission decision is consistent with the Court's discussion of this topic which lends even more credence to the Commission's decision in that the balancing in this case favors granting the certificate. Of course, this is not to imply the Commission completely ignored those factors, but they just should not be the Commission's primary concern.

**D. Tax abatement and public funding and substantial positive impact**

Tax abatement and public funding were not controversial in this case as there is no public funding or any tax abatement beyond the tax incentives allowed by the State and Federal Governments. Further, as noted above, Beech Ridge has agreed to pay at least

\$400,000 to Greenbrier County regardless of the actual amount of taxes owed ( Conclusions of Law 17 and 18, Comm'n Order of August 28, 2006).

As discussed above in the interests of the public section, the Commission feels this project will result in substantial positive impact on the state and local economy. Therefore, in summary, the Commission balanced the interests of the applicant, the general interests of the state and local economy and the interests of the public and found that the positives outweigh the negatives. The Commission then saw there was no public financing or tax abatement involved and determined the project would result in substantial positive impact on the local economy and local employment. So, the Commission properly performed its duties as set forth in West Virginia Code §24-2-11c.

**II. The purpose of the Commission's Siting Rules is to require applicants to collect, document and display data on the project's impact on the surrounding area and also to put the applicant on notice as to the information it needs to consider to complete the permitting process.**

Beech Ridge is the first application filed after the issuance of the Commission's Siting Rules on September 10, 2005. However, the Commission had heard several other applications for authority to construct electric generation facilities. In those cases, the parties seemed to repeat requests for certain information about the project. Therefore, the Commission included this information in its rules in an effort to minimize discovery disputes and facilitate the development of a case. The Commission also requires the parties, including the applicant, to file pre-filed testimony before the hearing.



After Beech Ridge, the first applicant under these rules, made its filing, the Commission had to exercise its judgement as to the sufficiency of the filing in two respects. First, with regard to particular items challenged by the Petitioners including: maps, and associated designations of major transportation routes, water sources, religiously significant areas(churches and family cemeteries), the Commission had to determine whether the application was sufficient to constitute a filing that warranted review and consideration by the Commission. Second, the Commission had to evaluate the sufficiency of the filing as a whole based on the application, filed testimony, exhibits, and oral testimony.

**A. The Commission properly determined the application of Beech Ridge was sufficient.**

The Commission did not ignore or revise its rules, nor did the Commission improperly interpret an unambiguous regulation. Specifically, MCRE believes the Commission erred because Siting Rule 150 C.S.R. § 30-3-3.1.h.2 states the application shall include a map at least as large as 1 inch:4800 feet containing at least a 5-mile radius that shows major population centers, major transportation routes and utility corridors, bodies of water to be effected by the project, topographic contours, major institutions, incorporated communities, areas of local interest, and land use classifications. MCRE feels the Beech Ridge map did not meet these regulations.

The Commission shall respond to these allegations in seriatim:

First, MCRE argues the map was not a sufficient size. The Commission considered this argument in its Initial Order dated August 28, 2006. On Page 18 of that Order in Note

5, the Commission states:

Siting Rule 3.1.h.1 requires applicants to provide an ANSI size D map of 1 inch to 4800 foot scale or larger. An ANSI size D map is 22" by 34". For facilities covering as many acres as Beech Ridge's, a project is too large to fit on a 22" by 34" map at 1":4,800' scale. Beech Ridge, then, provided an ANSI size D map showing the entire project at 1":5,416.89' scale. Upon these facts, the Commission accepts Beech Ridge's revised scale, finding it preferable to have the entire project depicted on a single map, instead of two maps.

The Commission acknowledges that it accepted Beech Ridge's filing of a map that changed the scale by 1/10 of an inch. However, the Commission determined, based on the size of the project, that it had a preference for one map which depicted the entire project. Also of significance is the minimal practical impact of changing the scale from 1-inch to 9/10 inch. In making this judgment, the Commission had in mind its overall goal of requiring Beech Ridge to adequately collect and document relevant impacts of the project and to display them in a meaningful way to the Commission and the affected community members.

Second, MCRE argues Beech Ridge left many of the required designations of the Siting Rules, off its 5-mile map, the effect of which meant the Commission was not apprized of the impacts the proposed project would have on the local communities. MCRE felt the Commission should have dismissed this application because of these supposed deficiencies and stated this situation was similar to the facts of In Re Appalachian Power Company, Case Number 93-0123-E-CN, where the Commission dismissed an application for an improper map.

The Commission determined the original 5-mile map provided by Beech Ridge

showed most of the cultural and historical interests and contained sufficiently the significant cultural and historical interests and that it therefore complied with the Commission's Siting Rules (Conclusion of Law 4, Comm'n Order of January 11, 2007). The Commission acknowledged the 5-mile map submitted by MCRE contained several items that were not on the Beech Ridge map, including four churches missed by Beech Ridge, several private cemeteries, roads, "springs", and other items MCRE felt were of local significance. However, the Commission found this case was different from the Appalachian Power Company case because the map in that case was so insufficient that the project could not proceed, and the Beech Ridge map was not that deficient (Conclusion of Law 14, Comm'n Order January 11, 2007). Ultimately, the Commission found the significance of local cemeteries and whether local roads constitute major transportation routes are matters upon which reasonable minds can differ (Conclusion of Law 3, Comm'n Order of January 11, 2007). Also the Commission specifically determined the project would have no impact on the water in the area based upon the expert testimony of Mr. Eli McCoy (Conclusion of Law 36, Comm'n Order of August 28, 2006). The Commission determined the fact Beech Ridge did not include those items on the map did not warrant dismissal of the project (Conclusion of Law 4, Comm'n Order of January 11, 2007). One of the purposes of the map is to give notice to the public of the potential impact of the project upon the surrounding area. Certainly, MCRE, the Eisenbeiss, and others were given ample opportunity to express their concern upon anything in the area regardless of its depiction upon the map.

Third, MCRE argues the Commission did not support its conclusion that Beech Ridge “substantially complied” with the Siting Rules with any finding of fact or conclusion of law as to what constitutes “substantial compliance.” To support this argument, MCRE points out the Commission never said how many churches, cemeteries, parks, recreational areas, hunting or fishing areas, historic sites, or other sites required to be on the map are actually in the area. Apparently, MCRE believes the Commission should have used some formula to determine when “substantial compliance” occurs such as 85% of the items the Commission determined were required were actually on the map. As stated above, the Commission found that what could be considered a major transportation route, a historic scenic area, or an area of cultural significance are matters upon which reasonable minds could differ, so setting an arbitrary compliance number would make no sense. In fact, taking the Petitioners’ argument to their extreme logic would mean that the omission of one item from any category of the comprehensive Siting Rules would require dismissal. It could reasonably be argued that under this standard no application, maps and exhibits could withstand such scrutiny and thus no project would survive dismissal and make it through the Commission process for review on its merits. The Commission concluded the Beech Ridge map contained the majority of the items the Commission’s Siting Rules required in this case (Conclusion of Law 4, Comm’n Order of January 11, 2007), thus defining “substantial compliance” to some degree. Also, the Commission found the Beech Ridge map was based upon data from WVU’s GIS Technical Center, SHPO for historical and cultural areas, and

local brochures for recreation, tourism, and cultural areas (Finding of Fact 12, Comm'n Order of January 11, 2007). The fact the Commission accepted the Beech Ridge map means the Commission, on some level, accepted the sources used by Beech Ridge.

Last, MCRE argues the idea of "substantial compliance" would lead to "minimal compliance" and then to placing the burden on intervenors. The Commission believes that only comes about through MCRE's own interpretation of the situation. When an application is filed, a 5-mile map must be included in the filing. If the applicant tries the "minimal compliance" route, that applicant risks either Commission Staff or an intervenor exposing those severe deficiencies. The effect of that could possibly lead to dismissal of the application if the deficiencies are so bad or at the very least, the applicant would be placed in a bad light in front of the Commission. However, that is not the case we have here where the applicant did more than "minimal compliance." By necessity, alleged deficiencies must be considered on a case by case basis. In this case, the result was MCRE added those items it felt was missing from the Beech Ridge map. It was totally MCRE's decision to make their own map, and the Commission appreciates MCRE's actions as they added to the knowledge of the case. However, the Commission determined the map filed by Beech Ridge was not insufficient. Furthermore, the Commission could not conclude that the procedural rights of MCRE were prejudiced by the omission of the items which MCRE argues should have been on the map.

MCRE's argues the Commission inappropriately interpreted the regulations in

question because those regulations were unambiguous. In other words, the Commission allowed Beech Ridge to file a map that did not have the elements the Siting Rules require to be on the map. The only interpretation involved in this case was the different interpretation of what constitutes a major transportation route, an area of cultural significance, a religious place and other such things. The Commission did not say the requirements of the regulations no longer apply, the Commission simply stated MCRE had a different definition of what the required items actually are than Beech Ridge's and the Commission's. So, contrary to the assertions of MCRE, the Commission did not violate Syl. Pt.1, of Consumer Advocate Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989). Unlike the dispute in the Consumer Advocate case, where the Commission allowed Hope to recover unaccounted for gas in excess of a specific percentage allowed in the Commission's rules, this dispute centers on the more subjective inquiry as to whether a particular item should have been depicted on a map and the element of human error where a particular item may have been overlooked or inadvertently left off the map. Furthermore, as MCRE itself states under the holding of Martin v. OSHA Review Comm'n, 499 U.S. 144 (1991), an agency's construction of its rules should be given substantial deference and when there is no ambiguity, the agency's interpretation should be 'reasonable.' The Commission believes that it was not interpreting a regulation, but allowing some interpretation and judgment of what is actually required by the regulation. Also, it is important to note this is the first case since the regulations in question went into effect, so, there is no long standing administrative

interpretation.

It appears as though counsel for MCRE now agrees somewhat with the Commission on this issue. In his Initial Brief in Liberty Gap Wind Force, Case No. 05-1740-E-CS, counsel argued:

This case can be distinguished from the *Beech Ridge* case because the issue in this case is not the level of compliance with the rule; that is whether each and every private cemetery must be on the map or whether a certain item is required to be placed on the map as the result of different interpretations of ambiguous provisions. In this case the issue is Liberty Gap's complete disregard of entire sections of EWG Siting Rule 150 C.S.R. §30-3-3.1.h.

(Friends of Beautiful Pendleton County Initial Brief filed on 5/17/2007 in Case No. 05-1740-E-CS, [http://www.psc.state.wv.us/imaged\\_files/Docket/2007\\_05/dck20070517154236.pdf](http://www.psc.state.wv.us/imaged_files/Docket/2007_05/dck20070517154236.pdf), p. 13). He now admits the argument in this case is the level of compliance with the rule and an interpretation of an ambiguous provisions within that rule. That is how the Commission has approached the issue and the Commission believes Beech Ridge complied with the rule enough to survive dismissal and also reasonably interpreted the ambiguous portions of the rule.

**B. The Commission did not amend Siting Rule 150-C.S.R. §30-3-3.1.o.1**

MCRE's other main argument in this area is that under Siting Rule 3.1.o.1.C, the Applicant shall estimate the impact of project on any historic, scenic, religious or places of cultural significance before granting a certificate and the Commission should have that information before it makes its decision. Apparently, MCRE is upset with the Commission

decision to condition this certificate on compliance with the office of State Historic Preservation Office. MCRE argues that reliance on SHPO means the Commission allows the applicant to submit relevant information after the certificate has been granted and that the applicant never estimated the impact to and described mitigation plans for areas of cultural importance as required by Rule 3.1.o.1. As discussed extensively above, the 5-mile map submitted by the applicant requires the applicant to supply all those items to the Commission prior to the granting of the certificate. In addition to the map, Beech Ridge filed pre-filed testimony of witnesses regarding cultural and historical matters. The addition of compliance with SHPO just adds another layer of review and protection to the public. SHPO is the appropriate state agency for matters of historic significance, and the applicant is required to comply with any requirements of that agency, including any mitigating measures that office establishes as appropriate. This requirement assures the concerns expressed by Susan Pierce, the Director of SHPO, that she could not give comment to the PSC prior to the Commission making its decision in this case are addressed (See Case File Generally, Letter Filed May 15, 2006). Finally, the Commission's requirement of a future compliance hearing insures Beech Ridge will obtain SHPO compliance and that any issues that agency identifies will be fully litigated and considered by the Commission.

Further, MCRE's argument does not fully comprehend the purpose of the Siting Rules. Those rules are designed not just to give the Commission and the parties notice as to the project's impact on the surrounding area, but also to put the applicant on notice as to all



the information it will need to consider to complete the permitting process. Just because certain items mentioned in the Siting Rules are not included in an application, does not mean the application is incomplete or the Commission does not have the information it needs to complete its statutory balancing. There is certain information that cannot be supplied until after the process has been completed and is more appropriate for another agency to carefully consider.

That is not to say the record is devoid of cultural and historical information or that the Commission completely ignored those issues or that this application did not meet MCRE's interpretation of the Rules. Indeed, much of the evidentiary hearing was spent discussing matters of cultural and historical significance. Many of the witnesses testified to those matters as well. The pre-filed rebuttal testimony of Paul Miller described the state of the project area. Mr. Miller works for Mead Westvaco, the owner of the land where the project is to be located. Mr. Miller's testimony indicates the land has been timbered twice in the past and many parts have been surfaced mined (Beech Ridge Exhibit PM One, filed at hearing on May 18, 2006). The testimony of Mr. Miller demonstrates it is highly unlikely the actual land the project is to be located on contains items of cultural, historical, or archeological importance. Also, the only true way to measure the project's impact on land it will be built on is to start digging the sites and see what is found. SHPO requires developers to enter into programmatic agreements in relation to what is found when a project is actually being constructed. So, the only impact this project would have on areas of cultural or historic

significance the Commission could have considered would be in the form of noise or a disruption of viewshed. That type of impact is very difficult to measure and the Commission appropriately left the mitigation of any of those impacts up to the expert in the area, SHPO.

**III. The conditions imposed in the Commission's order are appropriate, consistent with the statute, and are designed to protect the public interest.**

During oral argument on the Statement of Reasons, the Court expressed concern over the ability of the Commission to impose conditions in its order, the number of conditions in the order, and, specifically, conditions related to culture and history.

Prior to 1999, electric generation was constructed by public utilities pursuant to certificates of public convenience and necessity issued by the Commission under West Virginia Code § 24-2-11. It was customary for the Commission to impose conditions in its orders issuing certificates. In 1999, the Commission received its first application from an exempt wholesale generator (EWG) for a certificate to construct a natural gas fired electric generator. This application was not protested and was promptly followed by several more applications which were issued certificates of public convenience and necessity. See, Pleasants Energy, LLC, Case No. 99-01634-E-CN, Commission Order, December 27, 1999; Twelvepole Creek, LLC, Case No. 00-0284-E-CN, Commission Order, June 1, 2000; Big Sandy Peaker Plant, LLC, Case No. 00-0532-E-CN, Commission Order, June 23, 2000; MegaEnergy, Inc., Case No. 00-1093-E-CN, Commission Order, December 21, 2000.

Although these initial applications were not protested by the public, in 2000, the Commission received its first application to construct a wind turbine project in Tucker

County. This project received public comment and protest and construction was authorized conditioned upon the applicant satisfying a memorandum of understanding, containing various conditions, between the applicant and the West Virginia Highlands Conservancy, Inc. Backbone Mountaineer Windpower, LLC, Case No. 00-1209-C-CN, Commission Order, December 28, 2000.

Late in 2001, the Commission issued a certificate to an applicant to construct a gas fired generator conditioned upon it satisfying certain noise concerns and obtaining water and air permits. Panda Culloden Power, LP, Case No. 00-1702-E-CN, Commission Order, June 27, 2001.

In 2002, the Commission issued a certificate to construct a natural gas fired generator subject to numerous conditions including that before it could begin operation, it would have to file with the Commission "evidence of completion and approval of the wetlands survey, endangered species study, historical and cultural significance studies." Marshall Power, LLC, Case No. 01-0030-E-CN, Commission Order, January 31, 2002, p. 30. Since this 2002 order, every Commission order has conditioned the authority to an EWG upon the applicant meeting various conditions including satisfying concerns of SHPO. Later in 2002, the Commission conditioned a certificate to construct a wind turbine project in Grant and Tucker County upon the applicant filing, prior to construction, "copies of the Historical and Cultural Significance Study or Phase I archaeological survey which was requested by the Department of Culture and History and evidence of the Department's approval or acceptance of the

study.” Mt. Storm Wind Force, LLC, Case No. 01-1664-E-CN, Commission Order, August 29, 2002.

In its Nedpower order, which has twice been the subject of appeal to this Court, the Commission issued a certificate for a wind turbine project and directed Nedpower to “file an historical/archaeological significance study with mitigation plans by the West Virginia Division of Cultural [sic] and History prior to commencing construction.” Nedpower Mount Storm, LLC, Case No. 02-1189-E-CN, Commission Order, April 2, 2003, p. 200.

In 2004 and 2006, the Commission issued a siting certificate<sup>7</sup> that authorized the construction of a major coal fired EWG that established conditions prior to commencement of construction that “Longview has filed all necessary environmental permits/certifications prior to commencing construction (including letters from U.S. Fire & Wildlife, WVDNR, W. Va. Division of Culture and History and West Virginia State Historic Preservation Office indicating either that Longview does not need to take further action or outlining what action Longview needs to take to be in compliance with that agencies rules/laws).” Longview Power, LLC, Case No. 03-1860-E-CS, Commission Order, August 27, 2004, p. 203; Commission Order, June 26, 2006, p. 131. These Commission orders regarding the Longview project have been the subject of three appeals to this Court.

By placing the conditions in its Beech Ridge order, the Commission was continuing

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<sup>7</sup>The Legislature passed H.B. No. 2870 on March 5, 2003, in effect ninety days from passage, which created the current process for exempt wholesale generators to apply for siting certificates instead of a certificate of public convenience and necessity.

a well established practice which has been developed to safeguard the various public interests. In these various orders, as well as its Siting Rules, the Commission has made it clear that it has no intention of supplanting the authority of the Division of Culture and History. Rather, the Commission is ensuring that applicants are aware of their need to address cultural and historical issues and satisfy the Division of Culture and History before construction can commence.

Regarding the ability of the Commission to impose conditions in its order, HB 2870 enacted in 2003, provides as follows:

“All material terms, conditions and limitations applicable to the construction and operation of the proposed facility or material modification of the facility shall be specifically set forth in the Commission order.” West Virginia Code § 24-2-11c(c).

The statute goes on to state that the Commission shall have continuing jurisdiction over the holder of the siting certificate for the limited purpose of “enforcing the material terms and conditions of a Commission Order.” West Virginia Code § 24-2-11c(e). Furthermore, the statute provides that if the Commission determines on its own motion, or the motion of any person, that the holder of the siting certificate has failed to comply with any “material terms and conditions of a Commission Order issuing a siting certificate,” the Commission may enforce the material terms and conditions of the Commission Order. West Virginia Code § 24-2-11c(f). The statute also provides that “any person may seek to compel compliance of the material terms and conditions of a Commission Order” issuing a siting certificate in any Circuit Court having jurisdiction. West Virginia Code § 24-2-11c(g) Finally, the statute

provides that “the material terms and conditions of a Commission Order” issuing a siting certificate shall continue to comply to any transferee of the siting certificate. West Virginia Code § 24-2-11c(h).

Thus, from a review of the plain language of the statute, it can be readily determined that the legislature intended that the Commission impose conditions in siting certificate orders and that those conditions become enforceable rights of parties before the Commission and before State Courts. The ability to impose conditions in the siting certificate order is there to protect the public. Again, the statute specifically provides that if conditions are not met, there is a right of action at the Commission and ultimately in court. Conversely, if a matter is not a condition in a Commission Order, there is no right of action at the Commission. In fact, the statute is clear that the Commission has no continuing jurisdiction over EWGs except for those matters contained in its order, either as material terms or conditions. West Virginia Code § 24-2-11c(e)

By providing for conditions and complaints regarding whether conditions are met, the Legislature preserved one of the key holdings of the Court in its decision, Affiliated Construction Trades Foundation v. The Public Service Commission of West Virginia, 565 S.E.2d 778 (W. Va. 2002) In that decision, the Court determined that EWGs were public utilities and more importantly, the Court noted that:

“[a]ny person having a good faith reason to file a complaint against a public utility”... “has standing to do so, notwithstanding the fact that such person or entity was not a party to prior proceedings for a certificate of convenience and necessity or other proceedings to which the complaint relates.” ACT, Syllabus

Rather than placing the burden on a future complainant to file a complaint and attempt to prove a negative that the project failed to comply with a material term or condition of a Commission Order, which the Commission believes is a very difficult burden, the Commission established a process in its Beech Ridge order which provides for a public hearing following the issuance of the siting certificate where the applicant must demonstrate that it has satisfied the pre-construction conditions. The applicant has the burden of proof and, unless it can demonstrate compliance, it cannot begin construction. The proceeding is open to the public and the public can participate and address the issues as it deems appropriate. The Commission believes that this process is far more desirable than relying solely upon the complaint procedure.

Well before the passage of the siting certificate legislation in 2003, the Commission had an established practice of imposing conditions in orders granting certificates of public convenience and necessity in their West Virginia Code § 24-2-11. In fact, in its brief to this Court, the appellant MCRE has conceded that it is appropriate for the Commission to impose conditions in its order with respect to certain issues. MCRE suggests that it is entirely appropriate for the Commission to condition its certificate on permit processes before the Department of Environmental Protection, for example however, MCRE implies that it is inherently erroneous for the Commission to condition the certificate on satisfying the Division of Culture and History on matters relating to culture and history.

It should be noted as stated above that this record is not void of testimony regarding issues relating to culture and history. The five mile map, submitted by the applicant identifies communities and "Eligible National Register of Historic Places Sites." The applicant also submitted the pre-filed testimony of Paul Miller, rebuttal testimony, April 25, 2006; and, Dr. Robert Patton, rebuttal testimony, April 25, 2006. As discussed previously, Mr. Miller testified on behalf of MeadWestvaco, which is the lessor of the land upon which the turbines will be located as well as most of the transmission line, that the land leased had been used extensively for commercial purposes including extensive timbering as well as surface mining. Mr. Miller went on to testify that the turbines and transmission facilities would not interfere with the lessor's future use of the land for commercial purposes (Beech Ridge Exhibit PM One, submitted at hearing on May 18, 2007). Consequently, in the Commission's view, the physical location of the turbines upon MeadWestvaco's land did not present apparent cultural or historical concerns.

The condition imposed by the Commission with respect to the Division of Culture and History is rather straight forward. The project has to satisfy the concerns of Culture and History and demonstrate at a future public hearing that it has satisfied those concerns, otherwise the project cannot be built.

Under West Virginia Code 29-1-8, SHPO has the duty to:

... locate, survey, investigate, register, identify, preserve, protect, restore and recommend to the commissioner for acquisition historic, architectural, archaeological and cultural sites, structure and objects worthy of preservation...develop a state plan to determine the needs and priorities for the



preservation, restoration or development of the site... review all undertakings permitted, funded, licensed, or otherwise assisted, in whole or in part, by the state...

Clearly, under its statutory mandate, SHPO has to be involved in this process and must give final approval on matters of culture and history before this project can be built. As a matter of fact, SHPO can completely stop this project if that office determines the project will substantially impact areas that are under their control and they determine there is no way to mitigate those impacts. That is just as the Legislature envisioned when it charged SHPO with protecting matters of cultural and historic significance. In no way did conditioning this certificate upon SHPO mean the Commission did not perform its statutory duty under West Virginia Code §24-2-11c. In an apparent effort to shift responsibility to the Commission, Susan Pierce, Deputy Historic Preservation Officer, in a letter to Commission dated May 12, 2007 said because Beech Ridge had not completed its work with her office, they "... request that the PSC within its authority assure that this project can reasonably avoid substantial direct or indirect adverse effects to historical resources." The PSC cannot perform that duty because that is what SHPO is charged with performing. Furthermore, the potential impact of this project upon matters of cultural or historic importance is not static and cannot be finally determined prior to construction. Potential impacts involve ongoing evaluations and are one reason SHPO enters into programmatic agreements with projects. So, why would the Commission develop a mitigation plan for any places of cultural or historic significance when another agency is charged with that duty and could overrule the findings of the

Commission? The answer is, the Commission would not, but would instead tell the applicant it must comply with the requirements of the appropriate agency.

As for MCRE's complaint that the public is not given the opportunity to make comment to SHPO, nothing prohibits MCRE from communicating its concerns to SHPO. Furthermore, at the future compliance hearing established by the Commission, MCRE will have the opportunity to evaluate SHPO compliance. The Commission gave the parties the right to present evidence on what they feel are areas of importance to them in the area and took those factors into account when making its decision. However, the Commission has no control over the process of the agency that has final say over issues of culture and history in West Virginia.

The Commission, being a creature of statute, can exercise only such power as authorized by statute. Eureka Pipeline Company v. Public Service Commission, 148 W.Va. 674, 137 S.E.2d 200 (1964); Wilhite v. Public Service Commission, 150 W.Va. 747, 149 S.E.2d 273 (1966). The Commission is not statutorily authorized to direct another agency to act. Nor is the Commission statutorily authorized to review another agency's decision on subject matters that are quite squarely for the other agency to address.

While the Commission wishes to cooperate with other agencies and does so by conditioning its siting certificate on applicants following other agencies' requirements, the Commission does not have the luxury of waiting on other agencies to act. The siting certificate statute provides a statutory deadline by when the Commission must issue a decision: West Virginia Code § 24-2-11c provides that the Commission must render a

decision within three hundred days of the date the application was filed. If no decision is issued within that time frame, then West Virginia Code § 24-2-11c provides that the Commission shall issue the siting certificate as applied for. Thus, the Commission cannot wait on other agencies, who do not have similar deadlines to act. Nor does the Commission believe it is reasonable to require applicants to seek approvals/permits from all other agencies before coming to the Commission. Thus, the Commission has added conditions to siting certificates to ensure that applicants are abiding by other administrative agencies' processes.

Again, assessment of a project's impact upon culture and history is not a static determination but is an ongoing process that continues through the construction phase. For example, the impact on an unidentified archeological site may not be known until construction starts and earth is moved. There is a mechanism used by the Division of Culture and History to handle this type of ongoing evaluation. The Rules of the Division of Culture and History provide for programmatic agreements among the project applicant, the agency that has issued the authority and the Division of Culture and History. 82 CSR 2-5.6. The very purpose of these agreements are to acknowledge that for large and complex projects, the impacts on culture and history cannot be determined at the time of the consideration of the application and agency action, but need to be considered as the project is being micro-sited and constructed. This type of agreement was used in a case where the Commission authorized the construction of a 765 kV high voltage transmission line in Wyoming and McDowell County to be constructed by Appalachian Power Company. Appalachian Power Company, Case No. 97-1329-E-CN, Public Service Commission Order granting certificate,

May 27, 1998. Following the issuance of the certificate of public convenience and necessity, the applicant Appalachian Power, the Division of Culture and History, and the Commission entered into a programmatic agreement in January, 1999 to assess the culture and historical impacts of the line. See, Exhibit A attached to this brief. If the Applicant did not comply with the terms of the programmatic agreement, an interested party could file a complaint with the Commission as well as taking advantage of any other recourse it may have. The consideration of cultural and historical impacts in this case are similar to the Appalachian Power Company high-voltage line, and could be addressed in a programmatic agreement if deemed appropriate by SHPO.

In summary, the Commission proceeding involved evidence which was submitted on cultural and historical matters. Consideration of this project's impact on matters of culture and history is an ongoing process or analysis. The Commission's order conditioned the construction of this project upon the Applicant satisfying any concern of the Division of Culture and History. If the conditions are not met, the project cannot be constructed. Whether or not the conditions were met will be the subject of a public hearing before the Commission which will provide every party the opportunity to participate. Rather than punting the issue, the Commission has made every effort to protect the public interest in this regard.

**IV. The Commission properly decided this case without the help of independently commissioned studies.**

During the pendency of this application, several of the Intervenors requested the Commission to direct its Staff to hire technical experts to conduct independent studies to evaluate concerns raised by the Intervenors. In response, the Commission stated each party is responsible for developing and producing its own evidence to support its respective positions. The Staff role is to analyze all the evidence presented and provide the Commission with an unbiased position. The Commission concluded it would be inappropriate for the Commission to require its Staff to evaluate Beech Ridge's evidence from another parties' perspective (Conclusion of Law 5, May 5, 2006). However, the Commission did state it expects its Staff to conduct a thorough, independent evaluation of everyone's position in the case (Conclusion of Law 6, May 5, 2006). Staff did what the Commission expected. It conducted a review of the evidence, including the studies provided, and gave an independent analysis of the filing. With regard to the studies, Staff reviewed them to make sure they were done within generally accepted practices. The Commission has the ability and obligation, in exercising its quasi-judicial powers, to review the studies itself and determine whether the studies are sufficient, based on the record that has been developed by the parties.

Also, it is not as though the parties were deprived of their right to submit their own studies. The Commission did allow all parties to submit studies from sources that were not subject to cross-examination, i.e. the Eisenbeiss' information from Dr. Nina Pierpont. However, that information, along with any other unsubstantiated study was considered public

comment and was treated as such (Conclusion of Law 7, Comm'n Order of August 28, 2006). The Commission allowed some of Beech Ridge's witnesses to give opinions about studies they had reviewed, but they were only allowed to testify to their own opinion and were subject to cross-examination (Conclusion of Law 22, Comm'n Order of January 11, 2007). In addition, the Council did provide the Commission with an independent study on the issue of the economic impact, so the record is not devoid of studies from sources other than the applicant.

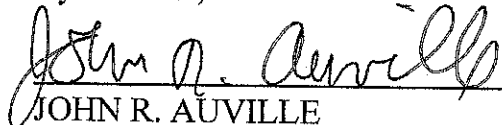
### Conclusion

WHEREFORE, the Public Service Commission, in its Orders of August 28, 2006 and January 11, 2007, has acted within the scope of its authority and properly granted Beech Ridge a siting certificate with an extensive number of conditions. The evidence in this matter supports the Commission's decision and the substantive result is proper. Therefore, it is respectfully requested this Court affirm the decision of the Commission to grant this certificate.

Respectfully submitted this 25<sup>th</sup> day of June, 2007.

THE PUBLIC SERVICE  
COMMISSION OF WEST VIRGINIA

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**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

**Mountain Communities for Responsible Energy v.  
The Public Service Commission of West Virginia  
and Beech Ridge Energy, LLC  
Supreme Court No. 33375  
Commission Case No. 05-1590-E-CS**

**and**

**Jeffery Eisenbeiss and Alicia Eisenbeiss v.  
The Public Service Commission of West Virginia  
and Beech Ridge Energy, LLC  
Supreme Court No. 33376  
Commission Case No. 05-1590**

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**CERTIFICATE OF SERVICE**

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I, John R. Auville, Staff Counsel for the Public Service Commission of West Virginia,  
hereby certify that I have served a copy of the foregoing "Initial Brief of the Public Service  
Commission of West Virginia" upon all parties of record by First Class United States Mail,  
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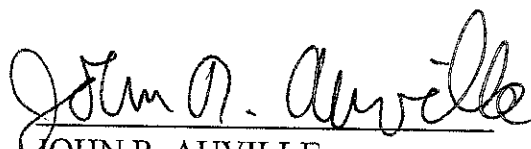
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